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IN THE

# Supreme Court of the United States

October Term, 1972

No. 73-196

GUS SCLAFANI,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Gus Sclafani prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on June 27, 1973, which affirmed his criminal conviction rendered in the United States District Court for the Southern District of New York.

### Opinion Below

The opinion of the Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

### Jurisdiction

The opinion of the Court of Appeals was filed on June 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1.)

## Constitutional and Statutory Provisions Involved

This case involves the due process clause of the Fifth Amendment to the United States Constitution, as well as the Sixth Amendment rights of the petitioner, ". . . to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

18 U.S.C. § 893 provides as follows:

> § 893. Financing extortionate extensions of credit
>
> Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credits, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years or both. *Added Pub.L. 90-321, Title II, § 202 (a), May 29, 1968, 82 Stat. 161.*

## Questions Presented for Review

1. Did the trial court effectively prevent any meaningful defense access to a material witness (a co-defendant who had entered a plea of guilty) by its threat to compound the witness' prison sentence unless the witness remained away from the petitioner and "as far away as possible," from the trial? Did this constitute a violation of petitioner's rights to a fair trial, to the effective assistance of counsel, and to compulsory process for obtaining witnesses in his favor?

2. Since the proof revealed that petitioner was only a messenger in the alleged scheme, did the Government fail to establish the two counts which charged that he had financed extortionate extensions of credit (18 U.S.C. § 893)? Does not the statute on its face require that, for one to be guilty of violating it, he must be the source of the funds rather than a mere intermediary?

3. Should the trial court have dismissed the three income tax counts, and was it error for the trial court to have charged the jury that mere membership in the conspiracy was a sufficient basis upon which to find that the petitioner was liable for income tax purposes for an equal share of the proceeds of the conspiracy over the three years of its existence, notwithstanding the fact that the government's evidence revealed him to be involved in the events of the conspiracy for less than three months of that time, only as a messenger, and did not establish that he received any of the proceeds?

## Statement of the Case

The indictment was filed on November 3, 1971, and petitioner was named in nine of thirty three counts. The essence of the charges was that he and five others * conspired to and did engage in a scheme to finance and collect extortionate extensions of credit (four counts; 18 U.S.C. §§ 371, 891, 893 and 894). The same indictment charged petitioner with failure to report as income the monies he allegedly received as payment of principal and interest with respect to the alleged extensions of credit (five counts; 18 U.S.C. § 1001, 26 U.S.C. § 7202).

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* Vincent Lore, Joseph Maida, and Joseph Randazzo entered pleas of guilty prior to trial. Angelo Tuminaro was a fugitive and did not stand trial. Thus, the trial herein had as defendants the petitioner and one Ben Ross.

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* Vincent Lore, Joseph Maida, and Joseph Randazzo entered pleas of guilty prior to trial. Angelo Tuminaro was a fugitive and did not stand trial. Thus, the trial herein had as defendants the petitioner and one Ben Ross.

Two of the tax counts were dismissed by the Court during trial. The jury returned a verdict of guilty as to each of the remaining charges.

Through the use of consecutive and concurrent sentences, an effective sentence of ten years imprisonment and a $30,000 fine were imposed upon the petitioner.

* * * * *

The conspiracy charged by the indictment and alleged by the Government's witnesses spanned the three year period from July, 1968 until July, 1971. The opinion of the Court of Appeals (Appendix A, *infra,* 1a *et seq.*) provides a broad review of the evidence without noting the very limited role alleged to have been played by the petitioner Sclafani. For that reason, we shall briefly recount the evidence as it applies to him.

Morton Kanof and Herbert Hurwitz were partners engaged in the construction business in New York City. Due to a shortage of operating capital and an inability to raise it through the usual legitimate channels, they let the word out that they were willing to pay loan shark rates. In July, 1968, they were introduced to Joseph Randazzo who agreed to lend them $25,000 at usurious rates (4a).

Although it was initially understood that the loan would be made in one lump sum, it appears that Randazzo had some difficulty in living up to expectations. Thus, commencing on September 9, 1968, through to October 7, 1968, he made advances to them totalling only $10,000. Some of the advances were in cash, while others were in the form of checks (which occasionally bounced). It was not until March 8, 1969, that the total $25,000 had been paid. In the meanwhile, the contractors were paying interest on the outstanding balance (4a).

Toward the beginning of March, the contractors began experiencing difficulty in meeting their weekly repayments

of the loan. Randazzo allegedly summoned them to a meeting at a social club in Manhattan, and, according to Kanof, Randazzo behaved wildly, waving a gun, and claimed that "his people" were going to take it out on him because the payments were not being made. The contractors responded that they would do their best (4a).

Toward the beginning of June, 1969, the contractors continued to have difficulty in keeping up with their weekly repayments, which they had been making directly to Randazzo. At that point, Randazzo allegedly introduced the petitioner Sclafani to them. This was petitioner's first appearance in any of the facts of this case. According to Hurwitz, the meeting occurred as follows:

> "Mr. Randazzo introduced Mr. Sclafani to me as Gus, and introduced the other gentleman, I don't remember his name, I never saw him again, and Randazzo then said that Gus was going to be making the payments from now on, and then Gus said to me, 'I don't want to get rough with you, but if I have to get rough, I will. I break legs or I break arms or I break hands. You bring that money to me every week'" (Tr. 1237).

Hurwitz also testified that, at this meeting, he requested and received from petitioner a telephone number at which petitioner could be reached (Tr. 1238).* For a short period of time thereafter, petitioner allegedly received most of the weekly payments from the contractors, and delivered additional funds to them.

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* The petitioner's brother-in-law testified that the telephone number in question was for the unlisted telephone at the home of petitioner's mother-in-law, with whom petitioner resided with his wife and baby daughter (Tr. 975) and that fact was so stipulated (Tr. 1051).

Thereafter, Randazzo introduced Kanof and Hurwitz to another co-defendant, Joseph Maida, in the latter part of July. Maida stressed the need for prompt payment. In turn, Kanof and Hurwitz requested that Sclafani be relieved of payment and collection duties since they were uncomfortable dealing with him. In or about the first week of September, petitioner's association with the matter terminated and he was not seen again. It can thus be seen that petitioner's alleged involvement in this matter covered, at most, only three months of a period of almost two and one-half years.*

It must be stressed that the only persons who claimed that petitioner was in any way involved in this case or that he raised the threat of force were Kanof and Hurwitz. Moreover, these witnesses, themselves, testified as follows:

*Hurwitz*:

"Q. Is it a fact that your entire dealing with respect to Mr. Sclafani encompassed the period from June through the end of September of 1969? A. Yes.

"Q. And prior to June of 1969 you never saw Mr. Sclafani? A. That is right.

"Q. *And subsequent to September of 1969 you never saw Mr. Sclafani? A. That is right.*

"Q. You saw him October 3rd, I think you said was the last date, is that right? A. Yes, sir.

* * * * *

"Q. Did he ever hit you? A. No.

* * * * *

"Q. Did you ever see him with a dangerous weapon? A. No.

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* As noted *infra*, even according to the testimony of the prosecution witnesses, his alleged participation may have been of an even lesser extent.

"Q. When for the first time did you ever hear Gus Sclafani's name mentioned or Gus? You didn't know him as Sclafani? A. I believe June 13th, 1969" (Tr. 1450-1452) [emphasis added].

*Kanof*:

"Q. Now, the entire scope of this transaction, then concerning the lending of this money encompassed, August of 1968 through November of 1970, is that correct? A. Yes, sir.

"Q. And there came a time when you became acquainted with my client, Mr. Sclafani? A. Yes, sir.

"Q. *For how long a period of time during the pendency of this entire transaction did you have occasion to have anything at all to do with Mr. Sclafani?* A. *Approximately two, two and a half* months.

"Q. And this was in 1969, is that correct? A. Yes, sir.

"Q. At any time, did Mr. Sclafani hit you? A. No, sir.

* * * * *

"Q. At any time, did Mr. Sclafani show you a gun? A. No, sir.

"Q. At any time, did Mr. Sclafani perpetrate any physical violence on you? A. No, sir" (Tr. 571-572) [emphasis added].

It will be noted that there is some variance between the testimony of Hurwitz and Kanof as to the beginning and terminating dates of petitioner's involvement; however, they are both clear that the length of his involvement was short and that he was not again seen or heard of thereafter,*

* A New York City detective was called as a prosecution witness and testified (Tr. 1736-1756), over objection, that he had petitioner under surveillance at points during the period from

[Footnote continued on next page]

that he never so much as touched them, and that he never exhibited a weapon to them. Neither of them testified that any discussions were held in petitioner's presence or that petitioner ever said anything which indicated that he had any economic stake in the venture.

Predicated upon the above, petitioner was charged with full responsibility for the totality of a conspiracy which extended for almost two years following his exit from the case, and he was charged with income tax violations upon the theory that one-fifth of the payments made by Hurwitz and Kanof, during this entire period, as to both interest and principal, was attributable to him.*

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[Footnote continued from prior page]
October 19, 1970 until April, 1971. During October and November, 1970, he saw Sclafani and Randazzo together on a few occasions in the lower East side area where petitioner resided. On one of these occasions, he took a photograph of the two men together. The photograph, although taken after the arrest in the present case, was admitted into evidence, over objection. The prosecution conceded that the only purpose served by the detective's testimony and by the photograph was "for the purpose of showing real evidence that Randazzo and petitioner did know each other" (Tr. 1740). The detective had no knowledge concerning the length of time that the two men were acquainted, and never observed Sclafani commit any crime with Randazzo (Tr. 1756).

The prosecutor later stipulated that a defense witness would testify that Randazzo and petitioner had been friends for at least twenty years (Tr. 2266-2267).

* It was stipulated by the defense that Government Exhibits 152 and 153 were the Federal income tax returns of petitioner and his wife for the years 1968 and 1970, respectively, and that the defendant did not file an income tax return for the year 1969 (Tr. 2201-2202). It was further stipulated that the accountant who prepared the 1970 return would testify that the defendant stated that he derived his income solely from the wholesaling of general merchandise (Tr. 2200-2201). It was also stipulated that the petitioner's signature on the 1968 return was genuine (Tr. 2253), and that, although the petitioner did not sign the 1970 return, he did, in fact, file it (Tr. 2254).

Petitioner was, on this evidence, convicted upon all of the charges with the exception of two of the five income tax counts.

* * * * *

The above-noted facts constituted a very small part of the total proof in this case, as revealed by the facts contained in the Opinion of the Court of Appeals (Appendix A, *infra*). The events which followed petitioner's last appearance in the facts of this case depict a scene of terror, corruption, attempted subornation and a bifurcation of the original scheme into what can only be described as a hydra-headed multiplicity of schemes and objectives.

## REASONS FOR GRANTING THE WRIT

### I. The Intimidation of the Prospective Witness, Lore.

### A. The Factual Background

On *March 3, 1972,* prior to the instant trial, one of the defendants, Vincent Lore, entered a plea of guilty to certain of the charges contained in this and a related indictment (A. 41-76). During the course of the plea proceedings, the Court (the same judge who presided at the instant trial) interrogated Lore concerning some of the facts of the case. Significantly, Lore named as the source of the funds in the case and the source of his own directions, a person by the name of Hymie Rabinowitz (A. 63-64).* Rabinowitz was not named as a defendant in this case, nor otherwise mentioned in the indictment, and this version of events did not comply with the Government's trial theory. Moreover, Lore, referring to his own income from the transactions involved herein, told the Court: "I made nothing out of this here. I didn't make a quarter out of this here" (A. 65). This contention was in direct contradiction of the

* Citations preceded by "A" are to the appellants' appendix in the Court of Appeals.

Government's theory underlying the tax charges of the indictment.

During the course of the plea proceeding, the prosecutor (who was also the trial prosecutor herein) noted that ". . . the possibility is an extremely good one that" Lore might be a defense witness at the trial of the petitioner (A. 72).

On *June 12, 1972* (A. 79-93), Lore requested that the Court sentence him upon his plea, and the Court set the sentence down for June 28, 1972. The colloquy on June 12th makes three things crystal clear: 1) The Court was extremely well impressed that Lore had turned over a new leaf and intended to be a law abiding citizen;* 2) The Court intended to sentence Lore on all but one count; 3) The remaining count would not result in an additional period of incarceration for Lore *if* he at least remained neutral in the coming trial of petitioner; however, if he should testify beneficially to petitioner, the Court would throw the book at Lore when it came time for him to be sentenced on the remaining count.

The following extracts from that proceeding are illustrative:

> "The Prosecutor: * * * [I]t is my belief based upon the statements—made by Mr. Lore at the time of his arraignment on his plea of guilty that there

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* "The Court: I must confess that I was very deeply impressed by this young man's desire to square himself with God and Family . . ." (A. 78).

"The Court: * * * He is a very young man with two infant children. * * * He wants to square himself with all of his obligations * * *" (A. 80).

"The Court: My impression is that this young man, at the present time is anxious to step up front and be counted, and he wants to pay whatever penalty he has to pay and get it over with" (A. 84).

"The Court: * * * I was deeply impressed—I hope that some day you will read the letter he [Lore] wrote me—I was deeply impressed with what I believe has been a turning point in his life" (A. 88-89).

is a very strong possibility that Mr. Lore is going to elect to take the stand in this case, and testify for the defendants. I state to this Court positively and unequivocally that if Mr. Lore takes the stand and testifies as I feel he will, there is a very strong likelihood that Mr. Lore will be indicted on charges of perjury.

"It is my belief that Mr. Lore would rather have himself sentenced before he took the stand to testify for the defendants in this case, because if the falsity of his testimony was apparent to your Honor, as well as to the members of the jury, that might be a factor which your Honor would want to take into consideration.

"The Court: I have a way out of that. I can impose a sentence that I think he ought to have on one of the counts, and I can leave the other count open with a reservation that if he takes the stand and commits perjury I would take into account all of the subsequent conduct with respect to the other count.

"If I had no reason to suspect this man was acting in bad faith, but was trying to unburden his soul of his problem, then I would just make the sentence concurrent with the other count.

"[The Prosecutor]: That being the case, if your Honor were of a mind to do that, then the government can see no real objection to his not being sentenced before" (A. 85-87).

* * * * *

"The Court: You see, what it amounts to is this: if his conduct after his sentence was such that I could come to a conclusion that he had done something reprehensible, if he came on as a witness and committed perjury, or did something else of a similar nature, he would have to expect that his sentence on

**the additional count would be increased. On the other hand, if the situation has not been substantially changed and if my evaluation of his situation at the time of sentence remains substantially accurate, when the time comes for the imposition of sentence on the open count, then I would make that sentence on the open count concurrent with the sentence already imposed.**

**"[Counsel for Lore]: That is one way of handling it. I am just wondering why Mr. Aronwald feels that my client is going to commit perjury. It is always open to him to indict him for perjury under those circumstances.**

**"The Court: Have you any idea, or perhaps you do not care to tell me, and maybe it is none of my business, but have you any idea what his disposition is with respect to testifying at this trial as a witness for the defendants?**

**"[Counsel for Lore]: I don't know. I have not conferred with him.**

**"The Court: It would be better if he had nothing to do with it. I don't want to deprive anybody of the right to call witnesses. It is a God-given right. The government could call him, just as they could. But I think from his standpoint it would be better if he had as little to do with the case as possible.**

**"[Counsel for Lore]: That would be true from his point of view. I know there is a long association between him and Mr. Ross, and so you can't duck that in this situation. And I suppose it wouldn't happen, but it occurred to me as Mr. Aronwald was speaking, and I am troubled by this thought: suppose a jury were to convict Mr. Ross, does that enable Mr. Aronwald to say: 'You see, Mr. Lore was lying when he was on the witness stand?'**

"The Court: I don't know. Mr. Aronwald will come to his conclusions at the proper time and I will come to my own. We are leaving an area open for possible evaluation by him and by me. I feel very strongly that I would be doing this young man, as well as the community, a disservice in keeping him in this position, and I don't want to keep him in this position. On the other hand, I don't want to destroy any legitimate request that the government may have. I am caught on the horns of a dilemma" (A. 19-21).

* * * * *

"The Court: That is what I plan to do. There are three counts. I will sentence him on two counts, hold one count open with the intention that unless there are some serious untoward circumstances which should affect me, persuade me that I should modify the sentence, my intention would be to impose a concurrent sentence on the open court. But if there is something that is serious enough and persuasive enough to make me feel that the sentence I gave him was inadequate and improvident, then I would feel free to impose additional punishment. That is the only way I can think of that would satisfy the fields of Aronwald that perhaps we are caught in a trap by doing this" (A. 92-93).

On *June 28, 1972,* Lore appeared before the Court for sentence, and the Court said:

"The Court: I am going to impose sentence today on the two counts of the extortionate loan and the income tax case. Because of his changed situation due to the recent death of his father, I am going to keep the other count open. Hopefully, his conduct between now and the end of the trial of the other defendants will be such that I won't be called upon to impose an additional sentence, and at that time I hope that the sentence. [*sic.*]

"If any facts develop between now and then which lead me to believe that he is guilty of reprehensible conduct. [*sic.*]

"That is the posture in which this matter presents itself. He has pleaded guilty. The maximum sentence unless I choose to impose consecutive sentences on the indictment which I want to deal with today are five years on each count plus a fine" (A. 100).

Lore's attorney addressed the Court as follows:

"[Counsel for Lore]: I want to say with regard to the letter that Mr. Aronwald sent me, I conferred with Mr. Lore today about it at considerable length and I am prepared to say this—and I know it is your Honor's feeling and I know it is my feeling that in any trial here Mr. Lore should stay absolutely as far away from participating as the law would permit. If Mr. Aronwald or anybody else feels that a subpoena is appropriate, to have him come, we will come and he will testify and he will tell the truth. But other than that, your Honor, he has no intention of being a voluntary participant for anybody. I don't think that that is at all inappropriate, given the circumstances, and I don't think that it should weigh one way or the other. If Mr. Aronwald wants to subpoena him and put him on the stand, he is going to tell the truth, but it is not his intention to come for anybody" (A. 106-107).

The Court additionally noted:

"And you remember how late we stayed discussing that. You were bitterly opposed to Mr. Aronwald's motion, and I agreed to do it on the suggestion that he could be sentenced on two of these three counts and one would be left open, the obstruction

of justice count would be left open until after the trials were disposed of, and hopefully if there were no facts indicating any reprehensible conduct by this defendant I would make the sentence concurrent on that open count. If there were facts which would lead me to believe that his conduct was not above reproach, I would have to reconsider the entire matter and possibly impose a consecutive sentence" (A. 109).

and:

"[The Court]: You stand before me exposed to penalties of five years on each of these counts. As I told the attorneys and as the attorneys have agreed and you have agreed, I am not going to sentence you on the obstruction of justice indictment. I am going to leave that open. Hopefully I will not have any obligation to impose a consecutive sentence, but there—though there is that unpleasant possibility which looms over your head.

"Your attorney told me that he hopes that you will stay as far away as possible from the unfinished cases, and I hope that will be true. I hope that you will have the courage and the strength to tear out the roots that you have in this community, because I think that they are like an infected sore. I think that you have been brought up, up to this point, exposed to crime and with people involved in crime, and as long as you stay within shouting distance or even communication distance of these people your future is going to be tainted and infected. I think that you ought to find new horizons in a new community, far away from the one in which you have lived and to find new strength and new rewards far away from the people who have poisoned your existence and placed you on the road of delinquency" (A. 111-112).

The Court imposed a sentence of four (4) years imprisonment upon Lore, pursuant to the provisions of 18 U.S.C. § 4208(a)(2), thus making him eligible for immediate release in the discretion of the Parole Board, leaving the remaining count open (A. 112-113).

By an affidavit of prejudice, pursuant to 28 U.S.C. § 114 and dated August 21, 1972, counsel for the defendant Ross sought to have the trial Judge disqualify himself based upon the Judge's conduct with respect to Lore as recited above. Counsel stated that he had, in the Spring of 1972, interviewed Lore and that Lore had exculpated Ross (A. 129-130). Counsel asserted that, as a result of the Court's remarks to Lore, Lore had become unavailable as a defense witness (A. 132-133), thus depriving Ross of due process of law. Counsel asserted that by the aforesaid incidents "the Court has made clear its prejudice effectively precluded the defendant Ross from having the in favor of the Government's position and its conduct has testimony of a cooperative witness" (A. 134). Also submitted was the affidavit of the defendant Ross in which it was stated:

> "Everything set forth in Mr. Goldberg's affidavit is adopted herein. After Vincent Lore's court appearance on June 12, 1972, he advised me he would no longer be available to me as a witness to testify to my innocence. The reason as he expressed it was that he could not risk angering the Judge and the Judge had advised him not to testify as a defense witness" (A. 136).

On August 30, 1972, the Court denied the motion as being without merit (A. 137-139).

On September 11, 1972, the first day of trial, counsel for Ross again raised with the Court his frustrations in being unable to secure the attendance of Lore (who was

then in a Federal penitentiary in Petersburg, Virginia), for an interview in the presence of his attorney. Both the prosecutor and the Court, in substance, appear to have acknowledged that it would be foolish to call Lore as a witness without first having the opportunity to interview him. Thus, the prosecutor noted that he would not call Lore as a witness "in view of his attitude" (A. 118) and the Court noted to Ross' attorney "would you put him on the stand and start talking to him?" (A. 119). Counsel for Lore was present at the proceedings and stated that Lore did not intend to talk to anyone and was not going to voluntarily testify since:

> "On the sentencing I think your Honor stated that Mr. Lore would be well advised to stay as far away from this case as possible, in substance, if not in words" (A. 121).

Expressing a concern for the financial expenditures involved, the Court refused to order Lore's return to New York, stating:

> "I am not going to bring him here if you have no intention of calling him as a witness. You told me twice today that unless you could confer with him, you would not call him as a witness" (A. 124).

The Court requested that Lore's counsel confer with Lore by special delivery letter for the purpose of ascertaining whether Lore had changed his mind (A. 125).

During the course of the trial, Lore's attorney advised that he was not certain whether he would permit an interview of his client (Tr. 393).

**B. The Nature of the Due Process Violation**

In *Webb* v. *Texas*, — U.S. —, 93 S. Ct. 351 (1972), this Court reversed a criminal conviction under the following circumstances:

> "The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of

The Court imposed a sentence of four (4) years imprisonment upon Lore, pursuant to the provisions of 18 U.S.C. § 4208(a)(2), thus making him eligible for immediate release in the discretion of the Parole Board, leaving the remaining count open (A. 112-113).

By an affidavit of prejudice, pursuant to 28 U.S.C. § 114 and dated August 21, 1972, counsel for the defendant Ross sought to have the trial Judge disqualify himself based upon the Judge's conduct with respect to Lore as recited above. Counsel stated that he had, in the Spring of 1972, interviewed Lore and that Lore had exculpated Ross (A. 129-130). Counsel asserted that, as a result of the Court's remarks to Lore, Lore had become unavailable as a defense witness (A. 132-133), thus depriving Ross of due process of law. Counsel asserted that by the aforesaid incidents "the Court has made clear its prejudice effectively precluded the defendant Ross from having the in favor of the Government's position and its conduct has testimony of a cooperative witness" (A. 134). Also submitted was the affidavit of the defendant Ross in which it was stated:

> "Everything set forth in Mr. Goldberg's affidavit is adopted herein. After Vincent Lore's court appearance on June 12, 1972, he advised me he would no longer be available to me as a witness to testify to my innocence. The reason as he expressed it was that he could not risk angering the Judge and the Judge had advised him not to testify as a defense witness" (A. 136).

On August 30, 1972, the Court denied the motion as being without merit (A. 137-139).

On September 11, 1972, the first day of trial, counsel for Ross again raised with the Court his frustrations in being unable to secure the attendance of Lore (who was

then in a Federal penitentiary in Petersburg, Virginia), for an interview in the presence of his attorney. Both the prosecutor and the Court, in substance, appear to have acknowledged that it would be foolish to call Lore as a witness without first having the opportunity to interview him. Thus, the prosecutor noted that he would not call Lore as a witness "in view of his attitude" (A. 118) and the Court noted to Ross' attorney "would you put him on the stand and start talking to him?" (A. 119). Counsel for Lore was present at the proceedings and stated that Lore did not intend to talk to anyone and was not going to voluntarily testify since:

> "On the sentencing I think your Honor stated that Mr. Lore would be well advised to stay as far away from this case as possible, in substance, if not in words" (A. 121).

Expressing a concern for the financial expenditures involved, the Court refused to order Lore's return to New York, stating:

> "I am not going to bring him here if you have no intention of calling him as a witness. You told me twice today that unless you could confer with him, you would not call him as a witness" (A. 124).

The Court requested that Lore's counsel confer with Lore by special delivery letter for the purpose of ascertaining whether Lore had changed his mind (A. 125).

During the course of the trial, Lore's attorney advised that he was not certain whether he would permit an interview of his client (Tr. 393).

**B. The Nature of the Due Process Violation**

In *Webb* v. *Texas*, — U.S. —, 93 S. Ct. 351 (1972), this Court reversed a criminal conviction under the following circumstances:

> "The trial judge gratuitously singled out this one witness for a lengthy admonition on the dangers of

perjury. But the judge did not stop at warning the witness of his right to refuse to testify and of the necessity to tell the truth.* Instead, the judge implied that he expected Mills to lie, and went on to assure him that if he lied, he would be prosecuted and probably convicted of perjury, that the sentence for that conviction would be added on to his present sentence, and that the result would be to impair his chances for parole. At least some of these threats may have been beyond the power of this judge to carry out. Yet in light of the great disparity between the posture of the presiding judge and that of a witness in these circumstances, the unnecessarily strong terms used by the judge could well have exerted such duress on the witness' mind as to preclude him from making a free and voluntary choice whether or not to testify.

"In Washington v. Texas, 388 U.S. 14, 19, 87 S. Ct. 1920, 1923, 18 L. Ed. 2d 1019 (1967), we stated:

> 'The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to estab-

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"* *Cf. United States* v. *Winter*, 348 F.2d 204, 210 (1965), where Judge Weinfeld, writing for the Second Circuit, stated:

> 'Once a witness swears to give truthful answers, there is no requirement to 'warn him not to commit perjury or, conversely to direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it.'"

> lish a defense. This right is a fundamental element of due process of law.'
>
> "In the circumstances of this case, we conclude that the judge's threatening remarks, directed alone at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment. The admonition by the Texas Court of Criminal Appeals might well have given the trial judge guidance for future cases, but it did not serve to repair the infringement of the petitioner's due process rights under the Fourteenth Amendment.
>
> "Accordingly, the judgment is reversed."
>
> (93 S. Ct. 351, 353-354).

Under the circumstances of the present case, the trial Judge's treatment of the potential defense witness, Lore, was even more oppressive. In *Webb*, the trial Judge's threats would, at most, lead to a perjury trial where the witness would be able to argue his innocence to a jury. In the present case, since the trial Judge had yet to pass an open sentence on Lore, the Judge's power was absolute, and his threat to impose a maximum consecutive sentence was completely within his power and that power was exercisable to its fullest extent at the slightest whim of the Judge.

The Court's conduct in the present case had precisely the same effect as the intentional suppression of evidence by a prosecutor. Cf. *Brady* v. *Maryland*, 373 U.S. 85 (1963); *United States* v. *Polisi*, 416 F.2d 573 (2d Cir., 1969).

The gravely prejudical character of prosecutorial conduct similar to that of the Court in the present case has been repeatedly condemned. *Bray* v. *Peyton*, 429 F.2d 500 (4th Cir., 1970); *Coppolino* v. *Helpern*, 266 F. Supp. 930 (S.D.N.Y., 1967)

The *American Bar Association Standards Relating to the Prosecution Function* (Approved Draft, 1971), Section 3.1(c) specifically provides:

> "(c) A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. It is unprofessional conduct for the prosecutor to advise any person or cause any person to be advised to decline to give [information] to the defense information which he has the right to give."

There is no conceivable reason why the same standards of professional conduct should not apply to a Judge. Indeed, as held in *Webb, supra,* the standards are the same. *See also*: *Ex Parte Hudgins,* 249 U.S. 378, 384 (1919); *Scott* v. *United States,* 419 F.2d 264, 269 (D.C. Cir. 1969); *United States* v. *Marzano,* 149 F.2d 923 (2d Cir. 1945).

### C. The Effect of the Court's Suppression of Evidence Upon Petitioner

If Lore had voluntarily testified, his testimony would have contradicted the prosecution's case at least with respect to the details which he divulged at the time he entered his plea of guilty, *supra,* p. 10. Moreover, he could have provided the jury with a true insight into whether petitioner was understood by him to have continued in the conspiracy during the year following the last mention of petitioner in the testimony. If petitioner was not a member of the conspiracy during that period, then the extensive prejudicial evidence concerning the events of that year would not have been admissible against him. Who, better than Lore could attest to petitioner's status? It was Lore who was dealing with both ends of the loansharking operation. Finally, Lore would have been in a position to repudiate or verify their versions of events. Since it was only the credibility of these

witnesses that stood between petitioner and an acquittal, such information would have been of invaluable aid to the defense and to the jury.

It befits the Government to claim that Lore would not have been an important and material witness. The Government's efforts to secure him as a Government witness are spread upon the record (Tr. 96-99).

For all of the above reasons, we respectfully submit that the defendant was deprived of due process of law by virtue of the Court's conduct with regard to the witness Lore.

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* The testimony of Kanof and Hurwitz constituted the only evidence of the alleged involvement of petitioner and the nature of that involvement. Their credibility was sharply in issue. They admittedly spent over 200 hours together preparing their testimony, and each passed off the other's experiences as his own (Tr. 39-41), 61-81, 215-6, 259).

In their statements to the Grand Jury and to the FBI, they claimed that petitioner had delivered $50,000 to them; however, in their trial testimony they reduced the amount to $25,000 (Tr. 575-8, 2901-2). In their statement to the FBI, it was not noted that petitioner had threatened them (an essential element of the crime charged) (Tr. 2891). The memoranda they had kept during the course of the alleged conspiracy, noted the name of someone else as having collected payments from them, during the time, according to their trial testimony, that the petitioner was making all such collections (*See*: Gov. Exs. 55-7, and Tr. 224, 262-4). At trial they testified that petitioner had commenced receiving payments from them in early June, 1969 (Tr. 216, 1237), but later changed the time to June 11, 1969 (Tr. 225-32, 252-68).

Both men had convictions involving separate substantial larcenies (Tr. 536, 661-5, 855-8, 1401-2). Additionally, they engaged in the use of fictitious payrolls and fraudulent billing practices (Tr. 70, 743-54, 914-5), and were involved in a municipal housing scandal (Tr. 291-3). Although it permitted the defense to elicit the existence of the convictions, the trial court would not permit examination as to the underlying facts (Tr. 516-7, 857-8, 391-3, 743-54, 1401-2, 1553-6).

## II

**II. The Failure of the Government to Establish that Petitioner Violated 18 U.S.C. § 893.**

**The instant point was briefed and argued in the Court of Appeals, however, it is not discussed in the Court's opinion. It raises a question of statutory interpretation which does not appear to have been considered by any Court.**

**18 U.S.C. § 893 provides as follows:**

> **§ 893. Financing extortionate extensions of credit**
>
> **Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention *of that person* to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years or both. *Added Pub.L. 90321, Title II, § 202 (a), May 29, 1968, 82 Stat. 161* [emphasis added].**

**Count 3 of the Indictment charged that all of the defendants, including petitioner, conspired to violate §893 in that:**

> **"Said defendants would unlawfully, wilfully and knowingly advance money pursuant to a partnership agreement and profit-sharing agreement, as a loan, as an investment and otherwise, to the defendant Joseph Randazzo, *Gus Sclafani* [petitioner] and Joseph Maida, with reasonable grounds to believe that it was the intention of the said Joseph Randazzo, *Gus***

> *Sclafani* [petitioner] and Joseph Maida to use the money so advanced directly and indirectly for the purpose of making extortionate extensions of credit" (A. 12-13) [Emphasis added].

Count 4 of the indictment charged a substantive violation of § 893, alleging that *petitioner,* together with the other defendants, advanced money to Randazzo, *Sclafani* [petitioner] and Maida with reasonable grounds to believe that it was the intention of Randazzo, petitioner and Maida to use the money so advanced for the purpose of making extortionate extensions of credit (A. 14-15).

We respectfully submit that these two counts should have been dismissed.

1. The proof in this case was utterly devoid of any showing that petitioner ever advanced any money or property to another person for the purpose of having *the other person* effect an extortionate extension of credit. If anything, the only proof in this case with regard to petitioner was that he gave money to the ultimate recipients. It will be observed that the statute does not make the receipt of such funds by the second party a crime with respect to the second party.

2. The proof in this case is utterly devoid of any showing that petitioner anticipated, intended or did, in fact, share in any profits from the loan transactions, as alleged by Counts 3 and 4 of the indictment.

3. The events of this case take on three distinct stages: a) the advancement of money through Randazzo to Kanof and Hurwitz; b) the advancement of money through petitioner to Kanof and Hurwitz; and c) the advancement of money through Maida to Kanof and Hurwitz. With regard to the first stage, petitioner can hardly be held liable on some type of conspiracy theory since

the activities which are made illegal by the statute had all been completed prior to petitioner's alleged participation in the conspiracy. With regard to the second stage, petitioner cannot be held liable for having conspired to give something to himself. The statute requires a concert of action between the initial party or parties and the intermediary. As was held in *United States* v. *Sagor*, 49 F.2d 725, 727 (2d Cir., 1931), "where concert is necessary to an offense, conspiracy does not lie." As far as the third phase was concerned, there was no proof that Sclafani was the source of any funds to an intermediary, or that he even knew that additional funds were intended to be, or were, in fact, advanced to an intermediary for ultimate distribution to Kanof and Hurwitz.

## III. The Attribution of Taxable Profits to Petitioner Upon a Criminal Conspiracy Theory.

The theory upon which the government sought to hold the petitioner liable for a portion of the income derived from the loan transactions in this case, was expressed by a stipulation which was read to the jury by the prosecutor in place of the testimony of a Government witness. The defense merely stipulated that the witness in question would so testify, but did not stipulate as to the truth of the content of such testimony. The stipulation provided, in pertinent part, as follows:

> "That in the event that each of the defendants and the named co-conspirators are found by their actions or expressed by words or deeds *a proprietary interest in the loan transaction*, then the Internal Revenue Service deems each to be a participant in the joint venture or partnership return as required by law, the Internal Revenue Code was filed on behalf of this joint venture for the years 1968, 1969 and 1970; that in the absence of such a partnership return being filed or proof of the existence of a partnership agreement, either of which would set

> forth the respective distributive share of the proceeds for each partner or participant in the joint venture, the Internal Revenue Service deems each to share equally in the proceeds, that is to say take the income in the years '68, $11,206.92; for the year '69, $65,588.35 and for the year 1970, $76,834.24 chargeable to each of the participants and that each of the participants are chargeable with one-sixth of the interest income of the joint venture" (Tr. 2295-2298). [Emphasis added]*

In its charge to the jury, the Court completely omitted any reference to the requirement that a proprietary interest be shown before a taxpayer can be assumed to have shared in certain income. The Court merely charged the jury as follows:

> "Now, what the government did—and that is covered by the stipulation which you can or cannot accept depending upon your review of the fact—what the government did was to say, we have no affirmative proof as to what these partners shared with respect to this income. We assume that there was a joint partnership or a joint venture to engage in this loansharking. We assume, therefore, in the absence of affirmative proof, that the income was divided equally. That is a tax collection fiction applied by a tax collecter when he doesn't know the facts any better, when he has no additional information, and there is proof or in this case the as-

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*It should be noted that, immediately after the stipulation had been read to the jury during the course of the trial (it was not again read during the charge), the Court gave a preliminary instruction on the law to the jury and failed to indicate the necessity for them to find that the defendant had some proprietary interest in the loan repayments. Instead, the Court merely spoke in terms of ". . . a joint venture by certain individuals to enact a usurious transaction or to extend usurious credit loans . . ." (Tr. 2307).

sumption—as far as these schedules are concerned it is an assumption—that there was a partnership. Then the fiction or the rule of thumb, which is applied, is that each partner shares equally" (A. 259-260).

* * * * *

There was not a scintilla of proof in this case that the petitioner had any type of a proprietary interest in the income derived from the loans in question. At best, a fair reading of this record makes him out to be a mere messenger for a limited period of time. Although the evidence does not show that he received any compensation for his alleged efforts, if he did receive such compensation, nothing is indicated by the record that his payment was in the form of a vested interest in the proceeds of the loan. The factual situation presented by this record is no different from that in *United States* v. *Calamaro,* 354 U.S. 351 (1957), where it was held that mere intermediaries ("pick-up men") in a lottery operation did not, as such, have a proprietary interest in the enterprise, 354 U.S. 351, 353-354.

Furthermore, the Court's charge to the jury, in omitting the essential element of a proprietary interest, permitted the jury to convict upon a mere finding that the defendant was a participant in the conspiracy. It is clear that the two standards are worlds apart. Guilty participation in a conspiracy does not require a vested interest in the financial objectives of the conspiracy.

* * * * *

The District Court correctly charged the jury that, in order to convict the defendant, it was necessary for them to find that he knowingly and wilfully failed to report his true income (A. 207-208). These essential elements of the tax crimes charged clearly demonstrate the insufficiency of the evidence in this case against petitioner with respect

to the tax charges. Assuming *arguendo,* that the law and the facts are such that petitioner could be held criminally liable for the full range of transactions involved in the extensions of credit, the only theory upon which such liability can hang, is that a conspirator is liable for the activities of his co-conspirators in furtherance of the conspracy, *even though he is not aware of all of those activities.* However, that same theory will not support a tax prosecution based upon the income derived by some of the co-conspirators through the conspiratorial activities. Knowledge and wilfulness are prerequisites for a criminal tax conviction, and no such knowledge was shown by the proof in this case except with regard to the minor portion of repayments allegedly collected by petitioner over a two month period. The vicarious liability flowing from a conspiracy cannot supply these missing elements. In view of the utter failure of the Government to establish such knowledge, the petitioner's failure to include such income in his returns cannot possibly be deemed to have been wilful.

Although these questions were raised in brief and argument before the Court of Appeals, they were not considered in the Court's opinion.

**IV. Petitioner Gus Sclafani Adopts All Applicable Points Raised by the Petition for a Writ of Certiorari Scheduled to be Filed by the Co-Defendant Ben Ross.**

## CONCLUSION

**For all of the above reasons, the Petition for a Writ of Certiorari should be granted.**

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July, 1973